

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington 25, D. C.

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FCC 62-612  
20527

In the matter of )  
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Amendment of Part 0, the Commission's )  
Statement of Organization, Delegations )  
of Authority, and Other Information )  
to Implement Public Law 87-192, FCC )  
Reorganization Act )

REPORT AND ORDER

By the Commission: Commissioner Ford concurring in part and dissenting in part and issuing a statement in which Commissioner Lee joins.

1. On August 31, 1961, S. 2034, 87th Cong., was signed by the President and became Public Law 87-192 (75 Stat. 420). The purpose of that law is set out in the House Report (No. 723), 87th Cong., 1st Sess., p. 1:

The purpose of this legislation is to modify the Communications Act of 1934 so that the Federal Communications Commission will be able, by making better use of its own time and more effective use of its experienced and technically qualified personnel, to handle its large workload of adjudication cases with greater speed and efficiency than is presently possible.

It is hoped and believed that these changes in the law will enable the Commission to devote more of its time to major matters of policy and planning and to the more significant adjudication cases -- primarily these involving issues of general communications importance.

See, also, S. Rept. No. 576, 87th Cong., 1st Sess., p. 5. The Commission, in the attached appendices, has set forth the rule changes which it believes will best accomplish that purpose.

2. Review Board. The crux of the rule changes is the creation of a new Review Board, as contemplated by Public Law 87-192. That Board will consist of not less than three experienced Commission employees, who will be designated by the Commission and will continue to serve indefinitely. The Board will be responsible only to the Commission, but the Commission will not discuss the merits of any matter pending before the Board with the Board or any of its members.

3. Interlocutory matters. We have authorized the Review Board to take original action on the following interlocutory matters previously acted upon by the Commission, the Motions Commissioner, or the Chief Hearing Examiner (see section 0.207(b)):

F.C.C. Review Board  
Progress Report  
April, 1965

BACKGROUND

1. Introduction. On August 31, 1961, the Commission was authorized by law to delegate review functions in cases of adjudication to a board consisting of three or more Commission employees.<sup>1/</sup> Prior to this time, the Commission was required by law to review all initial decisions where exceptions were filed and to hear oral argument upon request. The purpose of this law was to expedite the disposition of adjudicatory cases and to make it possible for members of the Commission to devote more of their time to major matters of policy and planning and to the more significant adjudicatory cases, primarily those involving issues of general communications importance.<sup>2/</sup> On June 6, 1962, the Commission adopted regulations establishing a Review Board and prescribing its functions and the procedures under which it would operate.<sup>3/</sup> On June 8, 1962, the Commission announced the appointment of four highly qualified senior employees as members of the Review Board <sup>4/</sup> and, on August 1, 1962, the Board began functioning.

2. In late 1963 and early 1964, the Commission entered into a general review of the Board's activities and the regulations under which it was operating. The basic structure of the Board and the procedures were found to have worked out very well. In view of the benefits which had been achieved, the authority of the Board was substantially enlarged.<sup>5/</sup> On November 5, 1964, the Commission announced the appointment of an additional Board member to assist it with its new responsibilities.<sup>6/</sup> The Board is now composed of five members and a staff of 26, which includes 14 lawyers, 2 engineers and 10 secretaries.

<sup>1/</sup> Public Law 87-192, August 31, 1961, 75 Stat. 420. See 47 U.S.C. 155 (d).

<sup>2/</sup> H.R. Rep. No. 723, 87th Cong., 1st. Sess., July 17, 1961, at p. 1. See also S. Rep. No. 576, 87th Cong., 1st Sess., July 19, 1961, at p. 5.

<sup>3/</sup> FCC 62-612, 27 F.R. 5671, June 14, 1962; FCC 62-613, 27 F.R. 5660, June 14, 1962. Copies of these documents are attached to this Report.

<sup>4/</sup> The Public Notice announcing their appointments is attached. The four members originally appointed are still serving. Among them, they now have served with the Commission for a total of 82 years.

<sup>5/</sup> FCC 64-399, 29 F.R. 6441, May 16, 1964. A copy of this document is attached.

<sup>6/</sup> The Public Notice announcing her appointment is attached. The new responsibilities given to the Board are discussed in para. 6.

3. Structure of the Review Board. As a matter of law, the Review Board is composed of "three or more employees," who "shall be qualified, by reason of their training, experience, and competence" to perform review functions in cases of adjudication. They may perform no duties inconsistent with such review functions. They must be "assigned to cases in rotation so far as practicable and shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency."<sup>7/</sup> Under the Commission's rules, members of the Board are designated by the Commission, serve indefinitely on a full-time basis, and are responsible only to the Commission. Neither the Commission nor any of its members discuss the merits of any matter pending before the Board with the Board or any of its members. 47 CFR 0.361(e). The members of the Board, moreover, are fully subject to the separation of function requirements of the Administrative Procedure Act and the Communications Act. These provisions assure the independence of the Board and the integrity of its decisions. Indeed we believe that the Board is in the best possible position in this respect, since it deals only with adjudicative hearing functions and therefore has no occasion to enter into the discussion of policy problems with industry representatives or with Commission personnel.

4. Authority of the Review Board. The Review Board has no responsibility for the formulation of general communications policy. It exercises authority only in adjudicatory hearing cases.<sup>8/</sup> It is required to decide all matters coming before it within the scope of existing law, regulation, precedent and policies; and cases involving novel or important issues of law or policy are reviewed by the Commission rather than the Board. 47 CFR 0.361 (b), (c) and (d). But in spite of these limitations, by far the greater portion of the Commission's work load in this area is carried by the Board. Experience has demonstrated that most adjudicatory hearing cases do not involve novel or important issues of law or policy;<sup>9/</sup> and in these cases, the Board performs all of the functions previously performed by the Commission.

5. The work of the Review Board may be conveniently divided into three categories: (1) the review of initial decisions issued by hearing

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<sup>7/</sup> 47 U.S.C. 155 (d) (1) and (8). It is therein further provided that, "Such employees shall be in a grade classification or salary level commensurate with their important duties, and in no event less than the grade classification or salary level of the employee or employees whose actions are to be reviewed."

<sup>8/</sup> Under §0.365(a) and (c) of the Rules and Regulations, 47 CFR 0.365 (a) and (c), the Board may exercise authority in "mixed adjudicative and rule making proceedings" in the common carrier field.

<sup>9/</sup> It should be emphasized that many of the cases decided by the Board are of great importance to the principals, that they involve complex and lengthy records, and that they are vigorously litigated.

examiners; (2) the review of interlocutory rulings issued by examiners; and (3) original action on certain interlocutory matters. When the Board was established in 1962, it was assigned functions in all of these areas. The Commission reviewed the Board's operations in 1964 and, with the exception of category (2) above, made extensive changes in the Board's authority. As to category (3), the Board, as set up in 1962, had been given a wide variety of original interlocutory matters to act upon (e.g., petitions to intervene, petitions to dismiss an application). The Commission concluded in its 1964 review that an adequate body of precedent had been established in this area, that the hearing examiner could dispose of interlocutory matters more expeditiously than the Board, and therefore that responsibility for original action on such interlocutory matters should be assigned in large part to the hearing examiners, with review by the Board. The Board retained original authority over only two matters, in which the ruling usually affects the case as a whole (i.e., petitions to amend the issues upon which the case was designated for hearing, and joint requests filed by broadcast applicants for the approval of agreements looking toward the removal of a conflict between their applications). In these two respects, the Commission concluded that uniform rulings are of special importance, and that direct Commission review of these rulings (which Board action entails) should be preserved.

6. As in the case of interlocutory matters, extensive authority to review initial decisions was delegated to the Board in 1962. The Commission, however, retained authority to review initial decisions in all television broadcast proceedings, all revocation, renewal, cease and desist and forfeiture proceedings involving broadcast stations, proceedings involving the construction of Class II-A broadcast stations on clear channel frequencies, and proceedings involving a license to cover a construction permit in the broadcast services. The Board's success in reviewing the initial decisions assigned to it (see par. 9, *infra*), however, led the Commission to conclude in 1964 that its authority to review initial decisions should be substantially enlarged. Accordingly, it authorized the Board to review initial decisions of hearing examiners in all adjudicative proceedings, except those involving the renewal or revocation of a station license in the broadcast or common carrier services. Thus, nearly all initial decisions of hearing examiners are now reviewed by the Board. 10/ The objective is that all cases involving novel or important issues of law or policy be reviewed by the Commission and that all other cases be reviewed by the Board.

7. Procedures. The Commission's procedures provide maximum flexibility in determining whether a particular initial decision should be reviewed by the Commission or the Board. 11/ Delegations of authority are made to the Board either by rule or by order. When a case is designated for hearing by the Commission, it specifies the issues upon which the case is to be heard. It may at this time determine that novel or important issues are not involved and may therefore order the Review Board to hear any appeal, even though the

10/ Delegations of authority made to the Board in 1962 are set forth in FCC-62-612; see §0.207, as set out in the Appendix thereto. Delegations made in 1964 are set forth in FCC 64-399; see §0.365, as set out in the Appendix thereto. The reasons for the delegations and the changes therein are fully discussed in the covering documents.

11/ These procedures also apply to interlocutory matters, but are applied primarily to the review of initial decisions, which entails the final decision of the case as a whole. They are set forth at 47 CFR 0.361

case is not one delegated to the Board on a regular basis.<sup>12/</sup> It may take the same action when exceptions to the initial decision are filed. The Commission may, at any time, direct that any matter pending before the Board be certified by it to the Commission for decision. Any matter referred to the Board on a regular basis or otherwise may be certified by it to the Commission, with a request that the matter be acted upon by the Commission, if in the Board's judgment the matters at issue are of such a nature as to warrant Commission review of any decision which the Board might otherwise have made. Parties to the proceeding may request the Board to certify a case to the Commission but are not entitled to make such requests to the Commission. The parties and the Review Board can be relied upon to raise the question of Commission review, since they would naturally be reluctant to litigate or to hear a case, knowing that there would have to be a full review of the Board's decision. Finally, in the unlikely event that these procedural safeguards fail, the parties may obtain full Commission review by calling the major issues involved to the Commission's attention in an application for review of the Board's decision.

8. Under the law, the Commission is authorized to utilize the Review Board in any case of adjudication designated for hearing after August 31, 1961. If an initial decision is to be reviewed by the Board, exceptions and supporting briefs are filed with the Board, which then hears oral argument <sup>13/</sup> and renders a final decision. Except in interlocutory matters, the Board sits in panels of three; one member of the panel signs the Board's opinion and is responsible for its preparation. The Board's decisions have the same force and effect as decisions of the Commission, except that they are subject to review by the Commission, either on its own initiative or upon application by any party aggrieved. The application for review is a preliminary pleading, comparable to a petition for certiorari, whose purpose is to specify the factors which warrant Commission consideration of the questions presented.<sup>14/</sup> It may be denied by the Commission without giving reasons. If the application for review is granted, the parties are subsequently afforded an opportunity to file briefs, and may be afforded an opportunity to present oral argument, on the merits of the case.<sup>15/</sup> Applica-

<sup>12/</sup> Delegations of authority may be "adopted, amended, or rescinded only by a vote of a majority of the members of the Commission then holding office." 47 USC 155 (d) (1).

<sup>13/</sup> Oral argument is not mandatory but is granted in virtually every case upon request. Requests for oral argument on interlocutory matters are ordinarily denied.

<sup>14/</sup> Factors warranting Commission review are set forth, as follows, at 47 CFR 1.115(b)(2): (1) The Board's action is in conflict with statute, regulation, case precedent, or established Commission policy; (2) The action involves a question of law or policy which has not previously been resolved by the Commission; (3) The action involves application of a precedent or policy which should be overturned or revised; (4) The action involves an erroneous finding as to an important or material question of fact; (5) The action involves prejudicial procedural error.

<sup>15/</sup> In interlocutory matters, the Commission normally disposes of the merits on the basis of the application for review and related pleadings; and applications for review accordingly deal with the merits.